IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 280

PASQUALE J. ACCARDI, ET AL.,
Petitioners,

against

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

A 1960 agreement settling a labor dispute abolished certain jobs and provided for the payment of separation allowances graduated in accordance with the length of the compensated service of the employees affected. Since petitioners performed no compensated service for the respondent while in military service during World War II, this period was excluded in computing their allowances.

The question presented is whether Section 8 of the Selective Training and Service Act of 1940 overrides the labor agreement and compels respondent to compute petitioners'

separation allowances as though they had in fact rendered respondent compensated service during the time they were actually in military service.

The Statute

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U.S.C. App. (1946 Ed.) § 308, provides in pertinent part as follows:

> "(a) Any person inducted into the land or naval forces under this Act * * * for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the completion of such period of training and service, * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
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> * * * *
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> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
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> * * * *
>
> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B)

of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

In 1948 the Act was amended and Section 8 was renumbered 9. Section 9 is identical with its predecessor except that an additional subdivision 9(c)(2) was added providing:

"It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

This Court has expressed the view that Section 9(c)(2) is merely declaratory of the effect of Section 8 as interpreted by this Court in *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U. S. 275 (1946). See *McKinney* v. *Missouri-Kansas-Texas R. R. Co.*, 357 U. S. 265, 271 (1958); *Tilton* v. *Missouri-Pacific R. R. Co.*, 376 U. S. 169, 175 (1964).

Statement

Petitioners are World War II veterans who were working for the respondent railroad as "oilers" on tugboats

in New York harbor when they were inducted into military service in 1941 and 1942 (4a, 5a).* Upon completion of this service they resumed working for the railroad and were restored to their former positions with the same seniority date they formerly had (*ibid.*)

Thereafter, a substantial part of the railroad tugboat fleet in New York harbor was converted from steam to diesel power and the railroads serving the harbor, including respondent, took steps to eliminate the oilers from the diesel tugs. This led to a strike in 1959 in connection with which the intervention of the courts was invoked (5a). (*Baltimore & Ohio R. R. Co., etc.* v. *United Railroad Workers,* 176 F. Supp. 53 (S.D.N.Y.), *reversed* 271 F. 2d 87 (2 Cir.), *vacated and remanded* 364 U. S. 278). The dispute was finally settled in 1960 by an agreement between the labor unions and affected railroads. This agreement abolished the position of oiler on the diesel tugs and established a scale of separation allowances graduated in accordance with length of compensated service: oilers with less than twenty years seniority were discharged and received the separation allowance appropriate to their length of compensated service; oilers with twenty or more years seniority had the option to terminate their employment with the maximum allowance, or to remain as employees of the railroad as oilers or engineers.

Thus, the agreement used "seniority" to measure the right of an employee to retain his job and "length of compensated service" to measure the amount of his separation allowance. It was recognized that "seniority" included periods of military service whereas "length of compensated service" did not. Similarly, the time during which employees were furloughed for non-military reasons (layoffs, leaves of absence, full time union employment, phys-

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* References are to Appellant's Appendix in the United States Court of Appeals for the Second Circuit.

ical disability, etc.) diminished "length of compensated service" but not "seniority".

All of the petitioners received a separation allowance the amount of which would have been greater had it been measured by seniority rather than length of compensated service. They brought the instant suit to recover the difference, asserting that the respondent was constrained by the Selective Training and Service Act of 1940 to pay them separation allowances graduated only in accordance with seniority.

The United States District Court for the Southern District of New York granted judgment for petitioners on the cross-motions of both parties for summary judgment (229 F. Supp. 193, quoted 19a-24a). The United States Court of Appeals for the Second Circuit reversed unanimously, 341 F. 2d 72 (quoted in Pet. for Cert. App. pp. 17-22).

Reasons for Denying Writ

There is no conflict between the decision below and the decisions of this Court or of the court of appeals of any other circuit, nor is review otherwise warranted.

While this Court has never had occasion to consider this precise question, its decisions interpreting and applying the veteran reemployment statutes are entirely consistent with the holding below that the employer and the union were free to negotiate a labor agreement granting benefits to all employees including veterans scaled in accordance with the individual employee's "length of compensated service".

Decisions of this Court have established that where employment advantages such as seniority or promotions accrue solely as the result of the passage of time the veteran's time in military service must be counted. *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U. S. 275 (1946). Other decisions, however, have recognized that where the

labor agreement specifies that benefits depend upon prerequisites other than the passage of time, the veteran must meet these prerequisites. *McKinney* v. *Missouri-Kansas-Texas R.R. Co.*, 357 U. S. 265 (1958); *Tilton* v. *Missouri-Pacific R.R. Co.*, 376 U. S. 169 (1964). In *Tilton*, the most recent decision of this Court in this area, it was said (376 U. S. 169, 181):

> "This does not mean that under §§ 9(c)(1) and 9(c)(2) the veteran, upon returning from service, must be considered for promotion or seniority purposes as if he had continued to work on the job. A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period. But upon satisfactorily completing that period, as petitioners did here, he can insist upon a seniority date reflecting the delay caused by military service."

In the case at bar, the labor agreement makes the quantum of the separation allowance dependent upon something other than the mere passage of time. The standard negotiated was "length of compensated service". The objective presumably was to absorb the shock of job loss and to tide the employees over the period of readjustment. Other standards might with equal logic have been chosen, such as seniority, past compensation, the employee's age (as a presumed function of his difficulty in finding reemployment), the number of his dependents, a flat training allowance, etc. The parties here chose "length of compensated service". While they might have chosen "seniority" they did not. The flaw in petitioners' position is their unjustified insistence that "length of compensated service" is equivalent to "seniority", whereas it manifestly is not. The former is a more precise measure of the total service rendered to the employer. It excludes alike furloughs for military service and furloughs for non-military reasons such as layoffs, leaves of absence, physical disability, serv-

ice in the union, and the like. It does not, therefore, discriminate against veterans. As such it was clearly permissible. *Aeronautical Lodge* v. *Campbell,* 337 U. S. 521 (1949). In any event, there is no teaching in this Court which either directly or by the logic of its reasoning purports to preempt the right of the parties to choose "length of compensated service" to scale separation allowances.

The courts of appeals of several circuits have had occasion to consider whether time in military service must be counted where the labor agreement requires work on the job as a condition for qualification for benefits. The question has most frequently arisen with respect to vacations. Most labor agreements make eligibility for or the amount of vacation pay dependent upon the number of days actually worked or the amount earned during a previous period. The courts of appeals have consistently held that a veteran's absence during the qualifying period or his failure to satisfy requirements of actual work deprives him of such benefits.

Alvado v. *General Motors Corp.,* 229 F. 2d 408 (2 Cir. 1956);
Foster v. *General Motors Corp.,* 191 F. 2d 907 (7 Cir. 1951);
Brown v. *Watt Car & Wheel Co.,* 182 F. 2d 570 (6 Cir. 1950);
Dougherty v. *General Motors Corp.,* 176 F. 2d 561 (3 Cir. 1949);
Dwyer v. *Crosby Co.,* 167 F. 2d 567 (2 Cir. 1948);
Siaskiewicz v. *General Electric Co.,* 166 F. 2d 463 (2 Cir. 1948).

Only two other courts of appeals have considered this question in the context of separation or layoff allowances:

Seattle Star, Inc. v. *Randolph,* 168 F. 2d 274 (9 Cir. 1948);
Hire v. *E. I. duPont deNemours & Co.,* 324 F. 2d 546 (6 Cir. 1963).

The court below regarded both of these earlier decisions as sustaining its view and noted no contrary appellate decision. 341 F. 2d 72, 75 (Pet. for Cert. p. 22).

Petitioners admit (Pet. for Cert. p. 14) that the *Seattle Star* case is consistent with the decision below. They claim, however, that the *Hire* case is opposed and urge this Court to review because of the asserted conflict (Pet. for Cert. p. 12). Petitioners have misread the *Hire* case.

In *Hire*, the collective agreement provided what it termed "severance pay" every time an employee was laid off for lack of work. While a veteran was in service, employees of equivalent seniority were on two occasions laid off and paid severance pay. When the veteran returned, the second layoff was still in effect and he was placed on a recall list in accordance with his seniority. His employer refused to give him severance pay for either of the two layoffs. The court held that he was not entitled to pay for the first layoff because he was not then working. However, he was held entitled to pay for the second layoff because all the labor agreement required to qualify for severance pay was layoff for lack of work. The point decided was that the veteran who had been on the job when drafted and placed on laid-off status upon his return had been in effect laid off once and therefore qualified for severance pay under the agreement. Accordingly, there is no conflict between courts of appeals of different circuits which requires resolution by this Court.

Petitioners attribute unwarranted importance to the question involved. They apprehend a rising tide of separation pay contracts sparked by the progress of automation. But automation is not a new phenomenon. Neither are contracts for separation pay. Both have been a familiar part of the industrial scene ever since at least World War II when the veteran reemployment statutes were first enacted. Yet in a space of over twenty years the question has arisen only three times in lower courts. It is less likely

to arise in the future because of the growing acceptance of the principle of attrition as a solution for the problems of surplus manpower resulting from automation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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